70-345

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1892

BILL MILES SKILLMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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REASONS FOR GRANTING WRIT OF CERTIORARI

Comes now petitioner, and by his attorney of record, Kenneth K. Simon, files this Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, for the following reasons:

That on the 30th of April, 1971, the United States Court of Appeals for the Eighth Circuit in Cause No. ....., and styled U.S.A. v. Bill Miles Skillman, affirmed the judgment and sentence of the United States District Court for the Western District of Missouri wherein petitioner was charged with and tried on an indictment returned in six counts charging petitioner and others with violations of 18 U.S.C. 371, 18 U.S.C. 3215, 18 U.S.C. 641, 18 U.S.C. 2315 and 18 U.S.C. 641. And wherein petitioner was found guilty on one count of violation of 18 U.S.C. 371 and two counts of violation of 18 U.S.C. 641, the former being conspiracy to violate 18 U.S.C. 641 and the latter being the receipt of property under 18 U.S.C. 641.

Review is sought hereunder pursuant to the provisions of Title 28, Section 1254, United States Code.

The opinion below, a copy of which is appended hereto, held that there was no error in permitting the Government to establish the existence of a conspiracy by merely adducing evidence of a buyer-seller relationship between the petitioner and others.

It was further held that no error was committed by the Government in failing to disclose and make available for the defense certain tape recordings prior to trial. Further, it was held that there was no error in permitting the Government to introduce for impeachment purposes the aforesaid tape which was garbled and unintelligible in parts and which had been obtained as a result of a conversation with petitioner and a co-conspirator initiated from the Office of the U.S. Marshal by said co-conspirator at the behest of the Government at a time when the appellant had become the focus of the Government's investigation and at a time when it was apparent that the Government intended to rely on the testimony of said co-conspirator.

It was further held to be no error to permit the trial court, in its final charge to employ such language to the jury so as to imply that the jury had but two alternatives as to verdict: either to convict or to acquit when in fact there exists an implicit third alternative of no verdict due to lack of unanimity.

It was further held that there was no error in the trial court's refusal to compel a psychiatric examination of the Government's chief witness who had an extensive history of drug abuse and criminal involvement.

It was further held to be no error to permit the Government to prosecute the petitioner under a conspiracy count and the substantive count when both counts were embraced in and arose out of the same single transaction.

STATEMENT OF THE CASE

On August 26, 1969, petitioner herein was found guilty by a Jury in the United States District Court for the Western District of Missouri, Western Division and sentence was imposed on October 2, 1969 in accordance with the above.

The petitioner was indicted by a Federal Grand Jury which returned an Indictment in six counts, as follows: Count I, charging petitioner and others with violation of 18 U.S.C. 371, Count II, violation of 18 U.S.C. 3215, Count III, violation of 18 U.S.C. 641, Count V with a violation of 18 U.S.C. 2315 and Count VI with a violation of 18 U.S.C. 641. Petitioner was not charged under Count IV. Counsel in this case was retained.

The record reflects that the following evidence was adduced: That Thomas Gerald Tarpley, called on behalf of the Government testified that he was the Assistant Superintendent of the Station C branch Post Office at Atlanta, Georgia, that on February 20, 1967 he left the said

post office at 7 o'clock, that the building was empty and that he secured the same, that upon entering the building the following morning, at about 5:30 A.M. he noticed that the vault door had been cut and certain interior doors forced. Newton Swart testified that he was employed as a carrier at Atlanta Station C, aforesaid, during February, 1967, arrived at said Station at about 3:20 A.M. Upon his arrival, he noticed a hole burned in the safe, a crowbar and acetylene tank and thereupon called his supervisor and a postal inspector. Mr. Joseph Vineyard, employed by the Atlanta Post Office as Chief Finance Examiner testified that upon being called to Station C, Atlanta, February 21, 1967 and proceeded with an audit of the fixed credit of said station and discovered a shortage of $56,717.18.

Carlton Moore, being called by the Government testified that he was a dispatcher at the Florence, Alabama Post Office and so employed on March 7, 1967. On that date, he worked from 1:00 P.M. to 10:00 P.M. securing the doors and windows as he left and that the building was empty and locked. Meredith Daugherty, called on behalf of the Government testified that on March 8, 1967 he arrived at the Florence Post Office at about 5:00 A.M. to begin his duties as a general mechanic, that upon entering the building he noticed as he entered the office of the Assistant Postmaster that cabinets were unlocked and that he smelled the odor from a torch and noticed a hole in the safe therein situated. Mr. Donald Holt, the Postmaster at Florence, Alabama, testified that on March 8, 1967 he arrived at said post office at 5:30 after receiving a call from Daugherty, that he called the office of the Postal Inspector in charge in Chattanooga, Tennessee and the Postal Inspector in Decatur, Alabama, Mr. Railey.

Upon his arrival, Mr. Holt noticed cabinets had been forced and a hole cut in the vault located in the Assistant

Postmaster's Office. That upon gaining access to said vault later that morning, he made an inventory of its contents and those of the post office and discovered a shortage of $107,620.42 in stamps and money.

Mr. J. B. Rigney, Decatur, Georgia, upon being called by the Government testified that he was employed as the manager of Howard Johnson's Motor Lodge and was so employed for the preceding five years. Government exhibit 22 being a registration card and folio for said Motor Lodge and reflecting the guest statement and register of one William McCall for 10 March, 1967 and leaving the 11, was introduced together with the record of a telephone call made from said Motor Lodge and introduced as Government exhibit 63. Mr. Lewis Ostrander, being called by the Government testified that he was employed by the Holiday Inn in Independence, Missouri that on March 8, a party of three checked into said motel, the registration card bearing the name of Bill Taylor.

Wayne R. Richie, being called on behalf of the Government testified that he was employed as a Postal Inspector and in the course and scope of that employment did investigate the burglary and disposition of the proceeds therefrom from the Atlanta C Station and the Florence, Alabama post office made identifications of the foregoing exhibits and indicated that the same had been acquired on information from the witness, Knight.

William Knight, being called on behalf of the Government, testified that he had six prior felony convictions and was a former narcotics user although he hadn't used narcotics since 1960, that he was acquainted with the defendants on trial and made identifications of them. He further testified that he and Lewis had been involved in several burglaries together, that he was the owner of a 1964 Chrysler, license No. 28965, Alabama, that on 20

February, 1967 he proceeded from Wildwood, Florida, with defendant Lewis and drove to Atlanta, Georgia for the purpose of burglarizing Station C Post Office, that he and the defendant Lewis checked into a Ramada Inn at Chamblee, Georgia, Lewis using the name of Bill Tarver, the same being a suburb of Atlanta. Later that night, he and Lewis proceeded to the post office aforesaid, and proceeded to gain entry and cut a hole in the vault therein situated and proceeded to remove the contents from the vault. They then went back to the motel and proceeded to sort the articles removed from the vault, placing certain of the property aforesaid in a trunk purchased for that purpose and some army laundry bags, whereupon he called Mr. Bob Matthews, in Omaha, Nebraska and discussed the sale of the stamps stolen on the basis of a prearranged deal, that they left Atlanta proceeding toward Omaha in accordance with Matthews' instructions, with the stamps in their possession, driving toward Memphis, Tennessee. En route, and in the company of Bernie Lewis they received instructions from Matthews that they were to proceed to Kansas City and advise him when they arrived. Calling from Columbia, Missouri, they were advised to proceed to Chicago, where they checked into the Caravelle Motel located in a suburb of Chicago. The following morning they called Matthews and arranged to contact a party in Chicago to dispose of a portion of the stamps. After this transaction, they left for Kansas City after first contacting Matthews. Upon arrival, they checked into the Holiday Inn in Kansas City, Kansas, under the name of Allen Taylor. The following morning they once again contacted Matthews in Omaha and were given the number of a party to contact in Kansas City, being number VI 2-1777 and ask for Bill. He was given a building address and room number, 707 in the Rialto Building and that prior thereto he had called the number VI 2-1777 for the address and

room number above and that said number was by stipulation agreed to be that of Continental Investments, Inc. Upon arriving at that address, he parked his car on Grand, leaving Lewis in the car and went into the building to room 707 where he entered negotiations with Bill Skillman for the stamps. After a short while, he left the building to discuss the proposition with Bernie Lewis, then returned to finalize their transaction. The stamps were then carried to room 707 in said building still boxed in a footlocker and green army laundry bags and a part payment of $4500.00 was made and then left via airplane, after making arrangements to return to Kansas City for final payment and that the same was made by Mr. Skillman, in accordance with said arrangements, and left Kansas City by car driving through Florence, Alabama there apprising himself of the possibility of burglarizing the post office therein situated. He then returned to Atlanta, Georgia, and contacted Lewis for purposes of making final payment to Lewis of his share of the proceeds, and discussing the trip with him. Upon Lewis's arrival at Knight's home for payment they discussed the possibility of burglarizing the Florence, Alabama Post office with A. Y. Smith, and proceeded to Florence, Alabama, where Lewis, Knight and Smith burglarized the post office removing stamps and money. They then left Florence, Alabama, contacted Matthews from Arkansas and were instructed to go to Kansas City. Upon their arrival, Knight contacted Mr. Skillman and made arrangements to see him the following day. They then purchased two footlockers in which to place the stamps and loaded the stamps into said footlockers and green army laundry bags which they had. Knight again contacted Skillman and made arrangements for the sale and delivery of said stamps, receiving part payment then and reaching an understanding as to the balance due. Knight later returned to Kansas City to

receive final payment, which was later divided among the three men.

Rufus Russaw, being called on behalf of Mr. Bill Skillman, testified that on February 24, 1967, he saw Mr. Skillman in his office at the Rialto Building at about 12:30, in regard to the purchase of some property. At about 1:15, they left and drove to several pieces of property, consuming about two hours of time. At about 3:30, they returned to Ninth and Grand, where Mr. Russaw parted company with Mr. Skillman.

Stanford Katz, called as a witness on behalf of Mr. Skillman, testified that he was an attorney in Kansas City, that he was the son of Jerry Katz, and that to his knowledge his father used the office of Mr. Skillman in the Rialto Building for the conduct of certain business and that he had been in said offices on two occasions with his father, alone, and that one of those occasions was on 24 February, 1967 at about 2:30 in the afternoon. He further testified that his father was a stamp and coin dealer, and that the occasion of that last meeting was an effort by his father to raise money. Mr. Katz testified that he had on several occasions called his father at numbers assigned to Mr. Skillman's enterprises and left messages which were later returned by his father.

Maude Hackett, being called on behalf of Mr. Skillman, testified that she was employed part time by Mr. Skillman during the period of February, 1967, usually working during the lunch hour. She stated that to her knowledge, Mr. Jerry Katz did have a key to Mr. Skillman's offices, and that she was able to identify him from his photograph (Defendant's exhibit 2), and that he was "in and out" of said premises. She testified that in addition to Mr. Skillman, Mr. Frank Roder had a key to said premises, as did Mr.

Jerry Katz and Mr. Don Gilliland and Mr. Blosser, and further that said persons had, readily available, access to the answering service maintained for said offices. On occasion, Mr. Jerry Katz occupied said offices alone, without Mr. Skillman. She was unable to identify Lewis or Knight as having ever been in Mr. Skillman's office.

Nancy Skillman, wife of the petitioner, being called on his behalf, testified that on February 24, 1967, the petitioner arrived at the family home slightly after 4:00 in the afternoon. Mr. Skillman, being called to testify in his own behalf, stated that he had been in business at 906 Grand Avenue for 17 years, generally in the mortgage and real estate loans field, and that said address was that of the Rialto Building. He occupied Room 707 therein in 1967, the same being rented by his company. There were several individuals who had keys to said premises and access to the offices therein, among them Mrs. Hackett, Don Gilliland, Frank Roder, Frank Blosser and Jerry Katz, the latter person making frequent use of said premises. He maintained telephone service on behalf of his companies to those premises through VI 2-1777 and VI 2-4232 during the period in question in addition to which he had an answering service provided by Anserphone for the VI 2-4233 and VI 2-4232 numbers, but not for VI 2-1777. His records reflect a call made to Omaha, Nebraska, 402-556-2340 on February 8, 1967 from his office (Defense exhibit D 10-562), that number being used to provide service for Mr. Robert Matthews, to his personal knowledge from his prior business dealings with said person in connection with Marshall Auto Stores, but that he did not place the call in question on the date set forth. On February 24, 1967, Mr. Skillman arrived at his office around 9:00 A.M., spoke with Frank Roder and Jerry Katz who arrived about 12:00 after which, about 12:30-1:00 he left the office accompanied by Rufus Russaw to look at property. They re-

turned to the downtown area near the office sometime around 3:30 P.M. He specifically denied making any payment to Mr. Knight on February 24, 1967. Further he had no contact with Knight at any time, for any purpose nor did he receive a call from Knight in March 1967 relating to merchandise or goods for sale. The following morning, the 25 February, 1967, he left via Braniff for Des Moines, returning the 26th. He stated he had no contact with Knight March 1, 1967. On March 9, 1967 he conducted general unspecified business affairs but did not speak to Mr. Knight, nor did he contact Mr. Knight for any purpose. He did not meet with Amis Young Smith or Bernie Lewis on March 9, 1967. On March 14 of that year, he met several people, but did not have any contact with Knight. He had no memory concerning Government exhibits 82 or 83, nor of having a key to Mr. Browning's office, and has never had a key to a private storage area in his building. The only dealings he has had with Matthews were in connection with certain auto stores and the insurance thereof.

On cross-examination, Mr. Skillman reiterated his statement that he had never had contact with Knight and that he had never talked to Knight nor had he ever met Lewis. He further stated that he had never spoken to Knight on the telephone.

Wayne R. Richie, being recalled by the Government, testified that on November 24, 1967, having first secured permission from his supervisors he procured, from the U. S. Marshal's office in Tampa, Florida, a telephone call from Mr. Knight to Mr. Skillman. He (Richie) initiated the idea of having the call made by Knight, the same being charged to his (Richie's) office credit card. The call was interstate, the receiving party (Mr. Skillman) was not aware the conversation was being taped, the taping medium being an IBM portable dictating machine specially equipped. After

the said conversation was recorded, Mr. Richie retained possession of it, delivering a tape to a secretary for transcription and a copy to the U. S. District Attorney's Office. Objection to the introduction of said tape was made and overruled. The call was made to VI 2-1777, in Kansas City, Missouri and a conversation ensued between the parties, one of whom was Mr. Knight, with Mr. Richie and the recording device heretofore mentioned also listening and introduced in the form of an IBM recording belt as exhibit 92 and played for the jury, said admission being solely for impeachment purposes. Mr. Richie played said tape for the jury, but the transcript reflects that the original playing was inaudible to the reporter, and a later playing at the close of the proceedings was had for the record as follows:

"Operator: Operator.

Mr. Knight: I'd like to . . . (unintelligible) Kansas City, Missouri, Area Code 913, right?

Operator: I don't know. What was the city?

Mr. Knight: Kansas City, Missouri.

Operator: 816.

Mr. Knight: 816 . . . (unintelligible).

Operator: Let's see. 816.

Mr. Knight: Victor 2-1777.

Operator: Thank you.

Mr. Knight: And my number, Operator, is . . . (unintelligible) 425-848-5180. Operator, . . . (unintelligible) 425-848-5180.

Operator: I'm sorry, sir, I didn't get—I got 425 but I didn't get the last.

Mr. Knight: 845—I mean 848-5180.

Operator: Thank you.

Mr. Skillman: Victor 2-1777.

Mr. Knight: Hello, Bill?

Mr. Skillman: Yeah.

Mr. Knight: This is Bill.

Mr. Skillman: Bill?

Mr. Knight: Yeah.

Mr. Skillman: Bill who?

Mr. Knight: Knight.

Mr. Skillman: Huh?

Mr. Knight: Bill Knight.

Mr. Skillman: Bill Knight?

Mr. Knight: Yeah.

Mr. Skillman: How are you, Bill?

Mr. Knight: Not very good.

Mr. Skillman: What's the matter with you?

Mr. Knight: I'm in jail.

Mr. Skillman: You're in jail?

Mr. Knight: Yes, been in jail for some time. I didn't know . . . (unintelligible) or not and I hated to phone you.

Mr. Skillman: I hate for you to, also.

Mr. Knight: And maybe—got to get out of this cage with bond.

Mr. Skillman: Yeah, well, of course, we're in bond business, Bill.

Mr. Knight: Yeah, I know.

Mr. Skillman: Where are you?

Mr. Knight: In Tampa. In the county jail in Tampa, Florida, Hillsborough County Jail.

Mr. Skillman: Tampa, Florida.

Mr. Knight: $25,000 bond on a federal charge.

Mr. Skillman: Hillsborough County, Georgia?

Mr. Knight: No, Florida—Tampa jail.

Mr. Skillman: Yeah, I know. Hillsborough County.

Mr. Knight: Yeah.

Mr. Skillman: Well, who is your lawyer?

Mr. Knight: Name of Ed Kirkland.

Mr. Skillman: Ed what?

Mr. Knight: Kirkland.

Mr. Skillman: Where is he located?
Mr. Knight: He's located in Orlando.
Mr. Skillman: He's in Orlando?
Mr. Knight: Yes. Ed was . . . (unintelligible).
Mr. Skillman: $25,000 bond, huh?
Mr. Knight: Yes.
Mr. Skillman: What's the charge?
Mr. Knight: . . . (unintelligible) Dyer Act.
Mr. Skillman: Is what?
Mr. Knight: Dyer Act.
Mr. Skillman: Dyer Act.
Mr. Knight: Federal . . . (unintelligible) Dyer Act.
Mr. Skillman: Well, I don't know either . . . (unintelligible), Bill, . . . (unintelligible) I was . . . (unintelligible). Where are you calling from?
. . . (unintelligible).
Mr. Skillman: Well, I'm sure your lawyer could get ahold of him. Get the—do about . . . (unintelligible) for it and—maybe he can come up with an idea for it. Well, I'll see what I can do. Well, it's all right."

Mr. Skillman, called for surrebuttal, stated that he had made an effort, after hearing the above tape, to pinpoint the conversation therein set forth. His telephone records reflected that he received such a call and provided a cursory record of the calling party's first name, the place whence the call came, and the fact that the said party was charged with Dyer Act violation and a few extraneous notes. He stated that it was apparently his voice which was on the tape, but that were it not for his notes and the fact that his attention was directed specifically to this conversation, he would still have had no recollection that this conversation took place, and further, that despite the fact he occasionally provided security for authorized sureties, he performed no services for Knight and that at the

time Knight called, the name meant nothing to him. Both sides rested. The Government dismissed Counts 2, 4, and 5 leaving Counts 1, 3, and 6 for jury submission.

ARGUMENT

I

The opinion of the Eighth Circuit Court of Appeals in this matter conflicts with the Seventh Circuit Court of Appeals in the case of *U. S. v. Ford*, 324 F.2d 950 (1963), wherein the court stated that while formal proof of conspiracy was unnecessary in that a conspiracy may be proved entirely from circumstantial evidence and concerted action toward a common goal that "the relationship of buyer and seller, absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy to sell, receive, barter or dispose of stolen property, although both parties know of the stolen character of the goods. In such circumstances the buyer's purpose is to buy, the seller's purpose is to sell. There is no joint objective." The evidence in the petitioner's case reflects the role of petitioner as being at best a convenient and ready purchaser for a portion of certain stolen property on a purely casual basis with neither party having entered into an agreement or understanding with the other, either express or implied so far as the larger scope of the offense embraced in the charge of conspiracy is concerned.

It was held by the trial court that there was no error in permitting the government to establish the existence of a conspiracy by merely adducing evidence of a buyer-seller relationship between the petitioner and others.

II

The opinion of the Eighth Circuit Court of Appeals further held there was no error with respect to two aspects of the Government's managing of the matter of the tape recordings. The tape in question was the product of a conversation initiated at the behest of the Government by the Government's witness in chief, the accomplice Knight and made from the Office of the U.S. Marshal in Tampa, Florida to the petitioner. The petitioner at trial took the stand in his own defense and denied any contact with the witness Knight.

Whereupon the Government introduced a tape of the aforesaid conversation for impeachment purposes. Appropriate cautionary instructions with respect to this tape were given, however petitioner feels that the ruling of the Eighth Circuit Court is in conflict with the ruling of this court and other circuit courts in several particulars. Firstly, with respect to discovery of said tape, the petitioner moved on June 23, 1969 for the production and disclosure of all evidence favorable to the petitioner and on June 26 the court made its order directing the production of any written or recorded statements made by the defendant, whereupon the Government affirmatively stated it was not possessed of any such statement. The Eighth Circuit asserted that such tape was not a relevant statement pursuant to the provisions of Rule 16 as it was introduced as impeachment material and not for the purpose of any substantive proof. The petitioner relied on the cases of *Davis* v. *U. S.*, 413 F.2d 1226 (5th Cir. 1969) and *United States* v. *Crisona,* 416 F.2d 107 (2nd Cir. 1969, cert. den.) for the proposition that such tape recordings are discoverable, a rule distinguished in the instant case by the Eighth Circuit Court of Appeals on the facts.

The petitioner further urges that the Eighth Circuit erred in refusing to follow the dictates of this court with respect to the cases of *Katz* v. *U. S.*, 389 U.S. 347 (1967) and *Massiah* v. *U. S.*, 377 U.S. 201 (1964), with respect to the petitioner's rationale that the recorded conversation itself made under the circumstances present in the instant case, that is, at the behest of the Government and initiated by a man upon whom the Government intended to rely to make its case and directed to a man who had become the focus of prosecution interest, such conversations and recordings were in derogation of petitioner's rights under the Fourth Amendment to the U. S. Constitution. The Eighth Circuit further rejected the rationale of the Seventh Circuit in the case of *U. S.* v. *White*, 405 F.2d 838 (7th Cir. 1969), wherein that court relying on the *Katz* decision, supra, determined that a radio KEL set transmission between the defendant and a Government informer was in derogation of the Fourth Amendment. The interception in this case is analogous.

III

The petitioner urges that the Eighth Circuit Court of Appeals erred in holding that no error was committed by the trial court's failure to compel psychiatric examination of the Government witness Knight. There was evidence of Knight's addiction to narcotic drugs and further evidence of extensive criminal involvement for much of his life. The Government relied extensively on Knight's testimony to make its case against petitioner.

The burden of establishing incompetence rests with the party throwing questions of competence open to scrutiny. In view of this burden placed on petitioner, petitioner should be able, in order to intelligently meet this burden, to avail himself of the implied power of the court to order

such examination of a mental or physical nature required to determine the issue of competency.

IV

The Eighth Circuit rejected the petitioner's argument with respect to the final charge in which petitioner contended that, firstly, the charge was coercive in that it apprised the jury of only two alternatives that of "Guilty" verdict or "Not Guilty" verdict and failed to touch upon the possibility of a hung jury. In so doing, the Eighth Circuit rejected the rationale of the Third Circuit in the matter of *U. S.* v. *Fioravanti*, 412 F.2d 407 (3rd Cir. 1969), cert. den. 396 U.S. 837 (1970), wherein the court noted the existence of three possible verdicts, guilty, not guilty and no verdict at all and further noted that charges of the Allen type as given would not be tolerated in the future, although the court refused to reverse in the *Fioravanti* case itself. The clear conflict and lack of definitive and uniform standards renders this area a major source of difficulty in the area of criminal jurisprudence.

V

It was further held by the Eight Circuit Court of Appeals that no error was committed by permitting the Government to proceed against the petitioner both on the substantive count and the conspiracy count set forth in the indictment. It is the position of the petitioner that in the instant case the conspiracy and the substantive offense alleged against petitioner arose out of and were embraced within the same single transaction and that therefore, the Government is precluded from maintaining a separate prosecution on both such counts.

The petitioner urged below that the Government's position presupposes that the successful perpetration of the goals of the conspiracy and the conspiracy itself remain

separate and distinct from each other, a logically untenable situation. The petitioner urges that in cases where the accused acts as a principal both in the conspiracy and the successful perpetration of the substantive offense, these become merged. That is, the active, or substantive offense, once completed, merges with the passive or conspiratorial offense at least in such instances where the principals are the same. The Eighth Circuit Court of Appeals in rejecting this argument rejected the rationale of the cases of *Waller* v. *Florida*, 90 S. Ct. ..... (1969) and *Ashe* v. *Swenson*, 90 S. Ct. ..... (1969), wherein this court adopted the reasoning of the so-called "same transaction" test, rejecting the prior rationale of the "same evidence" test, in such cases.

Wherefore, petitioner respectfully prays that this court grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, and for a review of the questions involved herein.

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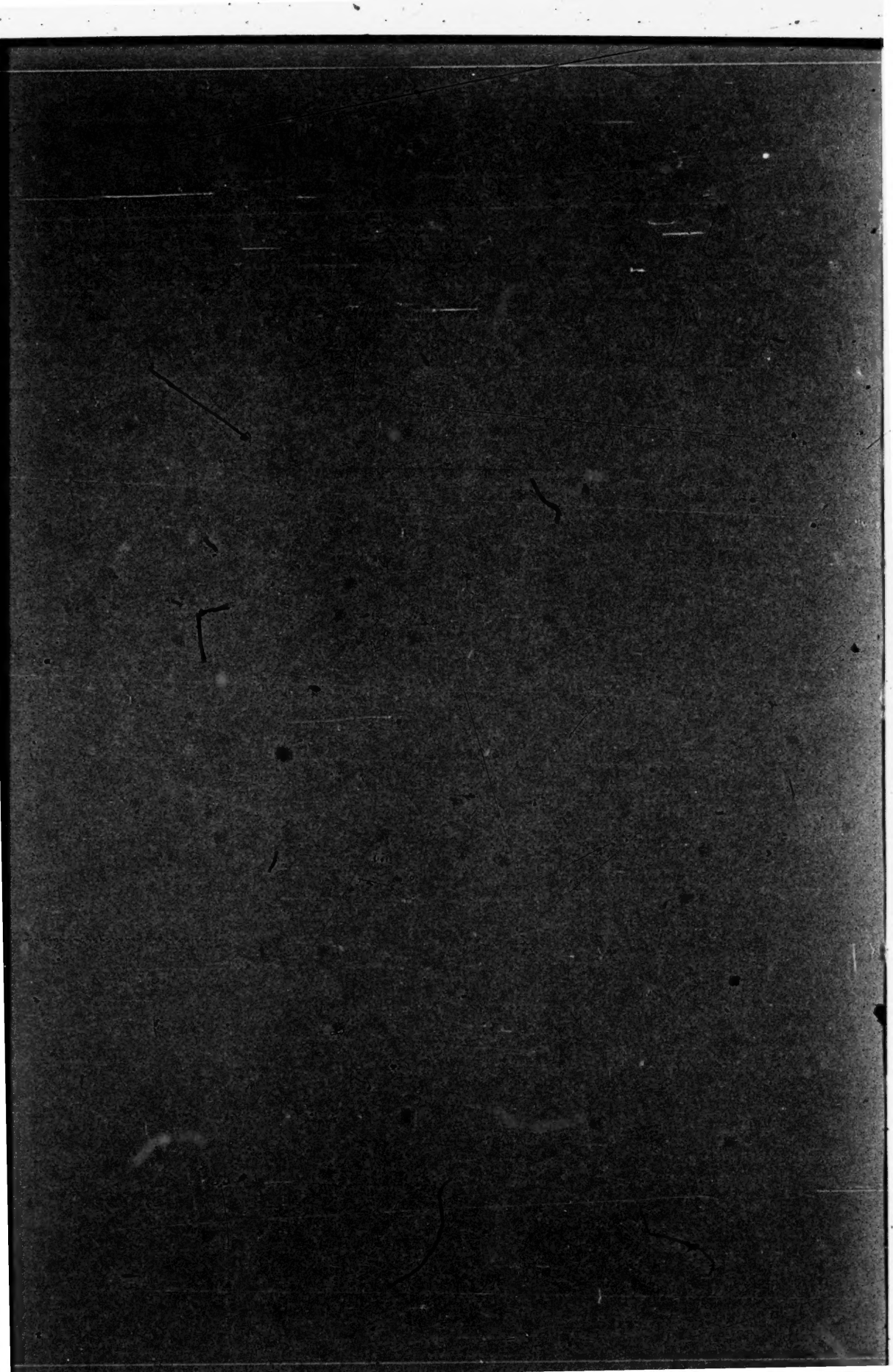

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,978

United States of America, Appellee, vs. Bill Miles Skillman, Appellant.	Appeal from the United States District Court, Western District of Missouri, Western Division.

[April 30, 1971.]

Before MATTHES, Chief Judge, HEANEY, Circuit Judge; VAN PELT, Senior District Judge.

VAN PELT, Senior District Judge.

Defendant, Bill Miles Skillman, appeals from a judgment of conviction upon three counts of an indictment charging in separate counts a violation of 18 U.S.C. § 371[1]

1. "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

(conspiracy to receive and dispose of stolen U. S. Postage Stamps) and two violations of 18 U.S.C. § 641[2] (receiving and disposing of U. S. Postage Stamps). The trial judge imposed a sentence of five years on the conspiracy count and separate sentences of seven years upon each of the other two counts, all sentences to run concurrently. We affirm the trial court.

I— SUFFICIENCY OF THE EVIDENCE

The evidence established two post office burglaries. In the burglary of the Station C Branch in Atlanta, Georgia, on February 20, 21, 1967, there was a shortage of stamps and money of $56,717.18. In the burglary of the Florence, Alabama, post office on March 7 and 8, 1967, there was a shortage in stamps and money of $107,630.42. Included in the stamps stolen was $3500.00 in 30¢ special delivery stamps.

Knight,[3] who had pled guilty, was a principal witness against the defendant. He testified that he and one

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2. "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

3. Knight entered a plea of guilty to the charges contained in the indictment. It was Knight who informed the government of the identities of those persons who had participated in the burglaries, and the manner in which the stamps were sold.

Bernie Lewis had been involved in several previous burglaries, and that the two men had driven to Atlanta, Georgia, on February 20, 1967, for the purpose of burglarizing the Station C Branch Post Office. He testified to the details of the burglary, which are unimportant to this appeal, and that after the burglary he and Lewis returned to the motel in Chamblee, Georgia, a suburb of Atlanta, where they had checked in previously. There they sorted the articles stolen and placed certain articles in a trunk purchased for that purpose and some green army laundry bags. Knight then called Bob Matthews in Omaha, Nebraska, to discuss the sale of the stolen postage stamps. Matthews informed Knight that he had a "drop" south of him (Matthews). Knight advised Matthews he had about $25,000 worth of stolen stamps, and Matthews informed Knight he would see what he could do.

Knight and Lewis started for Omaha. While en route, they again contacted Matthews and were instructed to proceed to Kansas City, Missouri, and advise him when they arrived. Another call was placed from Columbia, Missouri, and Matthews instructed the two men to proceed to Chicago, Illinois, since the party in Kansas City was not in town.[4] Knight and Lewis proceeded on to Chicago and there disposed of some $3500.00 worth of stolen stamps after a call to Matthews. Another call was placed to Matthews, and the two men were again told to proceed on to Kansas City. Upon their arrival, and checking in at a motel, they again placed a call to Matthews who instructed them to wait and that he would get in touch with the party in Kansas City.

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4. Exhibit 9, an airlines ticket, indicates that defendant flew from Kansas City to New Orleans and returned on the day this call was made.

Later, Knight again telephoned Matthews, and was instructed to call VIctor 2-1777[5] and ask for "Bill". Knight called the number and defendant answered. After introducing himself, Knight informed defendant a party in Omaha had given him his number, and defendant told him to come to his office, Room 707, Rialto Building, at Ninth and Grand, Kansas City, Missouri. After Knight arrived, he informed defendant he had approximately $50,000 worth of stolen stamps, to which defendant replied that he had been told that there was only $25,000 worth of stamps, and that he wasn't prepared to buy $50,000 worth. Knight replied that when he talked to Matthews he had not completed counting the stamps and had told Matthews he had only $25,000 worth. A sale was consummated on the basis of 20% of the face value of the stamps. Half of the money was paid at that time and half was to be paid after Skillman and his partner had made a final count.

The stamps were delivered to defendant's office later that day in a foot locker and in green army bags. Skillman had requested that delivery be delayed until everyone was out of the building. Skillman also arranged for Knight to get his car fixed, and Lewis took the car to the Shepherd Motor Company in North Kansas City. The two men then left Kansas City via airplane. Knight returned in a few days and was given the rest of the money due from the sale of the stamps. It was agreed between Knight and defendant at Skillman's office, that before any more stamps were brought to Kansas City, Knight would call defendant in advance and inform him of his impending arrival and the quantity of stamps to be purchased.

5. The record indicates that this number is one of defendant's office telephone numbers in Kansas City.

Subsequently, on March 7-8, 1967, Knight, Lewis, and one Smith burglarized the Post Office at Florence, Alabama. Knight again contacted Matthews, and was advised to proceed to Kansas City. Upon arriving they checked into a motel, where the stamps were put into two footlockers and green army laundry bags. Knight then telephoned defendant and the three men went to defendant's office where the stamps stolen in the second burglary were purchased by defendant after some negotiation. Late in the afternoon the footlockers and laundry bags containing the stamps were placed in a storage room in the basement of the Rialto Building, the use of which Skillman had obtained from the building manager, where they remained for several days.

Only defendant and the building manager had keys to the storage room. The footlockers eventually disappeared. The building manager found empty green bags in the room. Defendant told the manager he could do anything he wanted with the bags. They were turned over to the postal inspector, and upon examination, it was discovered that they contained perforations or punchouts identical in size and texture to those from genuine United States postage stamps. A portion of a thirty cent special delivery stamp was also found.

Various telephone, motel, credit card, and other records were identified in the stipulations filed in this case which sufficiently corroborate the travel and phone calls of Knight, Lewis, and Smith, as well as the travel and calls of the defendant.

Appellant challenges the sufficiency of the government's evidence to establish a conspiracy. In considering this question, we must view the evidence in the light most favorable to the jury's verdict. *United States* v. *Marttila*, 434 F.2d 834 (8th Cir. Nov. 25, 1970); *United States* v. *Ben-*

nett, 428 F.2d 772 (8th Cir. 1970); *United States* v. *Warner*, 428 F.2d 730 (8th Cir. 1970); *United States* v. *Fryer*, 419 F.2d 1346 (8th Cir. 1970), *cert. denied*, 397 U.S. 1055 (1970). We must accept as true and established all reasonable inferences that tend to support the jury's actions and conclusions. *United States* v. *Marttila*, *supra*; *United States* v. *Fryer*, *supra*; *Peterson* v. *United States*, 405 F.2d 102 (8th Cir. 1968), *cert. denied*, 395 U.S. 938 (1969), *rehearing denied*, 396 U.S. 870 (1969); *Cave* v. *United States*, 390 F.2d 58 (8th Cir. 1968), *cert. denied*, 392 U.S. 906 (1968); *Phelps* v. *United States*, 160 F.2d 858 (8th Cir. 1947), *rehearing denied*, 161 F.2d 940 (8th Cir. 1947).

The offense of conspiracy consists of an agreement between the conspirators to commit an offense, attended by an act of one or more of the conspirators to effect the object of the conspiracy. *United States* v. *Falcone*, 311 U.S. 205, 210 (1940); *Kirschbaum* v. *United States*, 407 F.2d 562, 565 (8th Cir. 1969); *Cave* v. *United States*, 390 F.2d 58, 69 (8th Cir. 1968), *cert. denied*, 392 U.S. 906 (1968). In order to establish a conviction under 18 U.S.C.A. § 371, the government must prove (1) an agreement, (2) a combination of two or more persons, (3) an unlawful purpose, and (4) an overt act committed by one of the conspirators in furtherance of the conspiracy. *Cross* v. *United States*, 392 F.2d 360, 362 (8th Cir. 1968).

Recognizing that proof of a conspiracy is seldom, if ever, established by a formal statement of such a conspiracy,[6] defendant asserts there must be some deliberate participation in furtherance of a common goal. Defendant contends that the evidence here establishes at best only a mere sale, and does not sufficiently establish any agreement to support a conspiracy conviction. Defendant relies

6. See *Koolish* v. *United States*, 340 F.2d 513, 523-24, (8th Cir. 1965).

principally upon *United States* v. *Ford*, 324 F.2d 950 (7th Cir. 1963):

> "The relationship of buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy to sell, receive, barter or dispose of stolen property although both parties know of the stolen character of the goods. In such circumstance, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective." *Id* at 952.

See also *Varelli* v. *United States*, 407 F.2d 735 (7th Cir. 1969).

Taking the evidence in the light most favorable to the jury's verdict, we think there was sufficient evidence to establish more than a mere buyer-seller arrangement. Knight's testimony indicated that he made several calls to Matthews in Omaha, who eventually told Knight to proceed to Kansas City, call defendant's telephone number, and ask for Bill, in order to dispose of the stolen stamps. From this it can be inferred that Matthews and Skillman worked together in the disposition of the stolen stamps, with Matthews acting as a go-between. When Knight told Skillman he had $50,000 worth of stolen stamps, defendant's response was that he had been told only half that amount would be delivered. This testimony, if believed, clearly established a prearranged sale of the stamps, and thus meets the requirements of (1) a prior agreement beyond the mere sale, (2) a combination of at least three persons, (3) an unlawful purpose, and (4) an overt act.

There is another aspect to the charge of conspiracy. Defendant contends that there was but a single transaction which occurred giving rise to both the conspiracy charge and the counts charging a substantive violation,

and that the maintenance of a prosecution on these charges, the conspiracy and the substantive offense, was untenable and prejudicial error.

In *Pinkerton* v. *United States*, 328 U.S. 640 (1946), the United States Supreme Court held that the commission of a substantive offense and a conspiracy to commit that offense are two separate and distinct crimes, with certain exceptions:

> "There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See *United States* v. *Katz*, 271 U.S. 354, 355-356; *Gebardi* v. *United States*, 287 U.S. 112, 121-122. Another is where the definition of the substantive offense excludes from punishment for conspiracy one who voluntarily participates in another's crime. *Gebardi* v. *United States, supra.* But those exceptions are of a limited character. The common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country. It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. *Clune* v. *United States*, 159 U.S. 590, 594-595. A conviction for the conspiracy may be had though the substantive offense was completed. See *Heike* v. *United States*, 227 U.S. 131, 144. And the plea of double jeopardy is no defense to a conviction for both offenses. *Carter* v. *McClaughry*, 183 U.S. 365, 395. It is only an identity of offenses which is fatal. See *Gavieres* v. *United States*, 220 U.S. 338, 342. Cf. *Freeman* v. *United States*, 146 F.2d 978. A conspiracy is a partnership in crime. *United States* v. *Socony-Vacuum Oil Co.*,

310 U.S. 150, 253. It has ingredients, as well as implications, distinct from the completion of the unlawful project. As stated in *United States* v. *Rabinowich*, 238 U.S. 78, 88:

> 'For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.'

And see *Sneed* v. *United States*, 298 F. 911, 912-913; *Banghart* v. *United States*, 148 F.2d 521." *Id.* at 643-44 (footnotes omitted).

See also *Callanan* v. *United States*, 364 U.S. 587 (1961), *rehearing denied*, 365 U.S. 825 (1961); *Williams* v. *United States*, 292 F.2d 157 (8th Cir. 1961); *Garner* v. *United States*, 277 F.2d 242 (8th Cir. 1960).

Defendant asserts that the cases of *Ashe* v. *Swenson*, 397 U.S. 436 (1970), and *Waller* v. *Florida*, 397 U.S. 387 (1970), have weakened this long-established rule, and that since the conspiracy and substantive offense are included in the same transaction, the government cannot successfully maintain two separate prosecutions. While such an argument is interesting, we consider it to be without merit. Generally, a conspiracy requires different proof of facts than does the substantive offense, and in that manner they do not arise out of precisely the same acts or transaction. Where both the conspiracy and the substantive offense do consist of the same acts or transaction, a conspiracy charge

may not be added to the substantive charge. *Pinkerton* v. *United States, supra.*

The second exception where a conspiracy charge may not be added to the substantive charge as announced in *Pinkerton* has significance in this case. Where the definition of the substantive offense excludes from any punishment a party who participated voluntarily in another's crime, then it is permissible to add a conspiracy to the substantive offense. Here the evidence shows that Matthews was a go-between, acting as the middleman between the sellers and the purchaser. It was Matthews who arranged both meetings, and with whom both Knight and the defendant were in contact. The government relies to a considerable extent on *United States* v. *Smolin,* 182 F.2d 782 (2nd Cir. 1950), where the court stated:

> "While the crime of receiving and possessing stolen goods necessarily involves the cooperation of the thief and the buyer, it does not necessarily involve the cooperation of the buyer and a go-between. . . ." 182 F.2d at 786.

While the instant case is readily distinguishable from *Smolin,* in that there was no evidence that Matthews and Skillman were buyers of the stolen stamps, it is sufficiently analogous to lend support to our holding. We conclude that the evidence establishes more than a mere buyer-seller arrangement, and hold that the evidence adduced on the charge of conspiracy was sufficient.

II— THE TAPE RECORDING

At the trial Skillman took the stand. He told what he did on February 24, 1967 and denied making any payment to Knight on that date. He said he had no contact with Knight at any time for any purpose and did not have a call from him in March, 1967 relating to merchandise or

goods for sale. He said he had no contact with Knight on March 1, 1967 and did not speak to Knight on March 9, 1967. On March 14 he met several people but did not have any contact with Knight.

The foregoing was in response to questions of his own counsel. On cross-examination he again answered that he had never had contact with Knight and had never talked to him and stated that he had never talked to him on the telephone.

It was then that on rebuttal witness Ritchie, a postal inspector, was recalled. He told of the procuring of a telephone call from Knight in Tampa, Florida, to Skillman and to recording the conversation. This recording was then offered for impeachment purposes and played. Parts were unintelligible. It did show sufficient conversation to indicate acquaintance between Knight and Skillman on a first name basis and contact between them.

Skillman on sur-rebuttal testified that his records did reflect this call, that he didn't hear the tape very well "but apparently it was my voice on the other end. * * * And had not someone directed me to the date of November the 24th, I still would have said I had never talked to Bill Knight. Q. In fact, did you know this Bill Knight at the time that this call was apparently received by you? A. No, and Bill Knight was not impressed upon me until after the indictment."

The court told the jury that the recording and the telephone conversation were admitted solely for such evidentiary value as they might have to rebut Skillman's statement that he never had a telephone conversation with Knight and not for any other purpose.

The receipt of this recording and the evidence relative thereto is assigned as error.

On June 23, 1969, a date well in advance of the trial, Skillman filed a motion entitled "Separate Motion of Bill Miles Skillman to Compel Disclosure of All Evidence Favorable to Defendant" (R. pp. 69-71). We will not prolong this opinion by copying it in full.

On June 26 the court entered an order enumerating the last two of the requests for information, including: "Written or recorded statements, or a summary of any statement made by defendant or copies of such statements." and "The results of reports of any scientific or economic tests or experiments or studies made in connection with the instant case, or copies of those reports." And then ordered in part: "The motion is therefore overruled to that extent, but with respect to the last two requests, if the Government has any such information, it should be made available to the defendant." The government on July 22, 1969 responded "The government advises it does *not* have in its possession any written or recorded statement of . . . any statement made by defendant Bill Miles Skillman."

It is the failure to produce this recording and its subsequent use that is assigned as error, it being claimed that it was entrapment and improper interception without notifying the party that the conversation was being recorded. It is further claimed that the questions asked the defendant were not sufficiently specific and thereby there was an improper foundation. It is now claimed that there was no compliance with the court's order requiring production of all written and recorded statements. This contention is made for the first time in this appeal. Therefore, it cannot be considered controlling. See *Peterson* v. *United States*, 405 F.2d 102, 107-08 (8th Cir. 1968), *cert. denied*, 395 U.S. 938 (1969), *rehearing denied*, 396 U.S. 570 (1969).

The matter was, however, fully discussed with and by the trial court. When defendant's counsel mentioned that

the government had been ordered to produce various lab reports and other reports, the court responded that the tape was not a lab report. Counsel did not pursue this issue any further. At the time of the original order and at the time of the government's response above noted, the United States Attorney was unaware of the existence of the tape recording later used for impeachment.

Even if we were to hold this issue cognizable on this appeal, the argument is without merit. The recorded conversation was not a "'relevant statement" under the meaning of Rule 16. It was introduced not as a part of the government's case-in-chief, but on rebuttal. *Cf. Harris* v. *United States,* 400 F.2d 264 (5th Cir. 1968). It was not admitted for its truth, but was admitted solely for the purpose of impeaching Skillman's denial that he had ever talked with Knight. There was nothing in the statement which had any bearing on the substantive crimes charged. See *United States* v. *Garrett,* 305 F.Supp. 267 (S.D. N.Y. 1969). *Cf. United States* v. *Federman,* 41 F.R.D. 339 (S.D. N.Y. 1969). The substance of the conversation was concededly innocuous, and the court instructed the jury not to consider the conversation for any purpose other than impeachment.[6a]

Defendant relies upon *Davis* v. *United States,* 413 F.2d 1226 (5th Cir. 1969), and *United States* v. *Crisona,* 416 F.2d 107 (2nd Cir. 1969), *cert. denied,* 397 U.S. 961 (1970), for the proposition that secretly made tape recordings are discoverable under Rule 16(a). There is no dispute with

6(a) Added authority supporting the correctness of the trial court's receiving the conversation for impeachment purposes is found in the case of *Harris* v. *U. S.,* ..... U.S. ....., '39 U.S.L.W. 4281, decided Feb. 24, 1971. The *Harris* case holds that a statement inadmissible against a defendant in the prosecution's case in chief because of lack of the procedural safeguards of *Miranda* v. *Arizona,* 384 U. S. 436 may under the facts of *Harris* be used for impeachment purposes to attack a defendant's credibility.

this generalized rule. However, the facts surrounding the introduction of the tapes in *Davis*, and in *Crisona*, are readily distinguishable from the case at bar.[7] Even if defendant had properly raised the Rule 16 issue, we conclude that there was no abuse of discretion in admitting competent evidence not previously disclosed under Rule 16(g). See *Hanson* v. *United States*, 393 F.2d 763 (8th Cir. 1968), *cert. denied*, 393 U.S. 833 (1968).

Defendant alleges further that a proper foundation for introduction of the tape for purposes of impeachment had not been laid, since there was no direction as to time, place, or circumstance of the making of the tape. Defendant denied categorically he had ever engaged in a conversation with Knight, or anyone representing himself to be Knight.

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7. In *Davis*, defendant was convicted by a jury for possession of and passing counterfeit federal reserve notes. The government introduced as part of its case-in-chief a tape recording of a conversation between defendant and a government informer in which defendant agreed to sell the counterfeit notes. The conversation was recorded with the informer's knowledge. The court of appeals held that the lower court erred in failing to allow discovery of the tape.

In *Crisona*, defendants were convicted of fraud and conspiracy. They had utilized a foreign corporation owned by one of the defendants to issue real estate financing commitments. The falsified corporation was used as a front for obtaining advance fees from various individuals in exchange for commitments to secure real estate financing. Tape recordings of various conversations were made prior to defendant's arrest, and defendant moved for production which was denied. Only one tape was received in evidence as part of the government's case. On appeal the court held that the tape recordings were discoverable under Rule 16(a), but that failure to compel disclosure was not reversible error, since defendants were given a transcript of the one which was played for the jury, and none of the others contained any information which could have reasonably been of use to defendant.

It is readily apparent that in both cases the tapes were introduced as part of the government's case-in-chief, and were held discoverable. Here, the tape was introduced as rebuttal evidence only. We are not unmindful of the teachings of *Kolod* v. *United States*, 390 U. S. 136 (1968), and *Alderman* v. *United States*, 394 U. S. 165 (1969). Upon examination, however, we conclude that our holding is not in conflict with the rules therein established.

The court heard argument and testimony outside the presence of the jury on the objection to foundation and admitted the tape for purposes of impeachment. After expressing a great deal of concern, the court stated that the categorical denial of defendant was sufficient for the limited admission of the tape. The court conceded that is admissibility was a close question.

Generally speaking, the admissibility of evidence is a question within the discretion of the trial court, and a court of appeals will confine its inquiry to whether there was an abuse of that discretion. *DeRosier* v. *United States,* 407 F.2d 959, 961 (8th Cir. 1969); *Wangrow* v. *United States,* 399 F.2d 106, 115 (8th Cir. 1968), *cert. denied,* 393 U.S. 933 (1968). This discretion is particularly broad where defendants are charged with conspiracy. *Wangrow* v. *United States, supra.* See also *Spinelli* v. *United States,* 382 F.2d 871 (8th Cir. 1967), *rev'd on other grounds,* 393 U.S. 410 (1968); *Cotton* v. *United States,* 361 F.2d 673 (8th Cir. 1966); *West* v. *United States,* 359 F.2d 50, 55 (8th Cir. 1966), *cert. denied,* 385 U.S. 867 (1966). We conclude that there was no abuse of discretion.

Defendant's next allegation is that the tape recording was garbled and unintelligible in certain respects, thus prejudicing his rights by permitting speculation as to its contents. Had the tape been admitted for its substantive truth, we would conclude that the point is at least arguable.[8] However, as we have earlier pointed out, the tape was not admitted for its contents. The jury was not left to speculate, for they were specifically told to disregard the contents of the tape recording. We hold there was no error.

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8. However, the fact that certain portions of a tape recording are inaudible does not necessarily render the entire tape inadmissible. That question is addressed to the sound discretion of the trial court. *United States* v. *Weiser,* 428 F.2d 932 (2d Cir. 1969); *United States* v. *Carlson,* 423 F.2d 431 (9th Cir. 1970).

Defendant also argues that at the time the recorded phone call was made, Knight was acting as a government agent in procuring the call, and that it was procured in derogation of defendant's fourth amendment rights. Defendant relies on *Massiah* v. *United States*, 377 U.S. 201 (1964), *Katz* v. *United States*, 389 U.S. 347 (1967), and *United States* v. *White*, 405 F.2d 838 (7th Cir. 1969), *cert. granted*, 394 U.S. 957 (1969), reversed ..... U.S. ....., decided April 5, 1971. *Katz* is readily distinguishable on its facts and is not applicable.[9] *Katz* involved electronic surveillance without the knowledge of any of the participants in the conversation. Here the conversation was recorded with Knight's permission. This same procedure has been upheld by the United States Supreme Court in *Lopez* v. *United States*, 373 U.S. 427, 439 (1963), where the use of a tape recording to corroborate testimony of a government agent was approved:

> "We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording."

See also *Lee* v. *Florida*, 392 U.S. 378 (1968); *Rathbun* v. *United States*, 355 U.S. 107 (1957); *Hemphill* v. *United States*, 392 F.2d 45 (8th Cir. 1968); *cert. denied*, 393 U.S. 877 (1968). We are not persuaded that the teachings of *Lopez* have been set aside by *Katz*, and therefore reject the holding of the Court of Appeals in *United States* v. *White, supra*.[9a] *Accord, United States* v. *Kaufer*, 406 F.2d

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9. Counsel for defendant conceded on oral argument that *Katz* is not controlling in this case.

9(a) After the submission of this cause, it was concluded to await the opinion of the United States Supreme Court in *U. S.* v. *White* which was to be argued in October, 1970. The opinion was filed April 5, 1971 and is reported in ..... U.S. ....., 39 U.S.L.W. 4387. A majority of the Court reject and reverse the holding of the Seventh Circuit in *White* and give support to an additional ground for rejection which was not discussed in the body of our opinion. *White* holds, as did *Desist* v. *U. S.*, 394

550 (2nd Cir. 1969), *aff'd* 394 U.S. 458 (1969), *rehearing denied*, 395 U.S. 917 (1969). *Cf. United States* v. *Hickman*, 426 F.2d 515 (7th Cir. 1970).

Similarly, *Massiah* v. *United States*, *supra*, is not here controlling. The situation in *Massiah* occurred after defendant had been indicted, and was held to have violated his sixth amendment right to counsel, not his fourth amendment rights, as contended by defendant in this case. The statements in *Massiah* were damaging in themselves; here the statements are totally innocuous. We hold defendant was not deprived of his constitutional rights by the introduction of this recording.

Finally, in regard to the tape recording, defendant asserts the court erred in not ordering production of the tape at the conclusion of either Knight's testimony, or at the conclusion of the direct examination of Postal Inspector Ritchie. He relies upon 18 U.S.C.A. § 3500:

> "(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, [sic] discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the

U.S. 244, that the case of *Katz* v. *U. S.*, 389 U.S. 347, decided December 18, 1967, is not to be applied retroactively to electronic surveillance which occurred prior to December 18, 1967. Mr. Justice Brennan concurred in the result in *White* solely on this ground, citing *Desist*, *supra*. The electronic surveillance used for rebuttal in *Skillman* for impeachment only related to a conversation which took place on November 24, 1967. For all of these additional reasons we are satisfied with the soundness of our original rejection of *White*.

witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * *

(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

* * *

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

To this contention there are two answers. First, it is evident that the statute is not applicable in this case since there was no testimony on direct examination either by Knight or by Ritchie relating to this conversation. The substance of the recording in no way dealt with the subject matter of their testimony, nor did it pertain to the substantive offense charged. Second, the tape reocrding was not a § 3500 statement within the meaning of the statute. In *United States* v. *Sopher*, 362 F.2d 523 (7th Cir. 1966), *cert. denied*, 385 U.S. 928 (1966), the court precisely explained what is meant by a § 3500 statement:

"A § 3500 statement is a recorded recital of past occurrences made by a prospective prosecution witness. From its very nature, necessarily it is made after those events have taken place. If a prosecutor, in reliance on the statement, uses as a witness the maker thereof as a part of the government's case, the statement must be produced for the use of defense

counsel. But a concurrent tape recording of a conversation between the payer and the recipient of an alleged cash bribe is obviously of contemporaneous sounds. The result is a preservation of a conversation just as it was spoken. It is direct evidence relevant on the issue of the alleged guilt of the defendants on trial. Made when the allegedly extorted bribe money was being paid, the tape recording in this case is of the actual voices of the briber and the bribee. It is therefore *not a recital of a past occurrence by a prospective witness* and is not within the general purview of § 3500." Id. at 525. (Emphasis in original)

Neither *Davis* v. *United States, supra,* nor *United States* v. *Crisona, supra,* are helpful to defendant. We conclude there was no error in failing to order production of the tape under § 3500.[10]

IV—SEVERANCE

Defendant next contends the court erred in failing to grant his motion for severance. Specifically, defendant contends that because of defendant Lewis' criminal record the jury was unable to heed the court's cautionary remarks and defendant was prejudiced thereby; the court limited the conspiracy solely to the first burglary; and defendant Skillman was not charged in Count IV. Failure to grant the motion, in light of these developments, it is contended was prejudicial. We disagree.

The conspiracy count charged Matthews, Skillman, Lewis, Knight, and Smith as codefendants, and covered a series of events occurring from February 20, 1967, to December 8, 1967, relating to both the Atlanta and Florence burglaries. Counts II and III charged Matthews,

10. In any event, there was other evidence corroborating Knight's testimony that he had conversed with defendant on the telephone other than the tape recording. We are thus hard pressed to find that admission of the tape constituted prejudicial error.

Knight, Skillman, and Lewis with the purchase and sale of stamps stolen from the Atlanta burglary, and Counts V and VI charged Skillman, Smith, Knight, and Lewis with the purchase and sale of stamps stolen from the Florence burglary. Count IV related to the transportation of the stamps from Florence, Alabama, and charged only Lewis, Knight, and Smith. Counts II, IV and V were dismissed at the close of the evidence.

Rule 8 (a) and (b), Fed. R. Crim. P. provides:

> "(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

In *United States* v. *McKuin,* 434 F.2d 391 (8th Cir. Oct. 16, 1970), this court said that

> "under Rule 8(a), Fed.R. Crim.P., joinder of offenses is ordinarily appropriate where, as here, the specific counts refer to the same type of offenses occurring over a relatively short period of time, and the evidence as to each count of necessity overlaps. Furthermore, under Rule 14, Fed. R. Crim. P., it is well settled that the trial court has a wide range of discretion in granting separate trials on different offenses and for different defendants, and in order to secure a

reversal it must be affirmatively shown that prejudice resulted from the failure to grant separate trials. *Fisher* v. *United States*, 324 F.2d 775, 780-781 (8th Cir. 1963). To the same effect, see *United States* v. *Christian*, 427 F.2d 1299 (8th Cir. 1970), *Cf. Gresham* v. *United States*, 374 F.2d 389, 390 (8th Cir. 1967)."

See also *Johnson* v. *United States*, 356 F.2d 680, 682 (8th Cir. 1966), *cert. denied*, 385 U.S. 857 (1966).

The conspiracy count provides the connecting link for joining both the offenses as well as the defendants. The rule should not be interpreted in a technical sense. 8 J. Moore, Federal Practice, ¶8.05[1], at 8-19 (2d ed. 1968). In *Tillman* v. *United States*, 406 F.2d 930 (5th Cir. 1969), *vacated on other grounds*, 395 U.S. 830 (1969), the court there succinctly analyzed the scope of inquiry under Rule 8. Because we think the rules announced therein have considerable significance here, we quote at length:

"Where, as here, the offenses arose out of a series of connected acts, trial convenience dictates 'that the government should not be made to prove the same facts more than once.' . . . 8 Moore, Federal Practice ¶8.05[2], p. 8-19 (2d ed. 1968). See Johnson v. United States, 8 Cir., 1966, 356 F.2d 680, 682. Thus, there was no misjoinder of offenses in the present case.

"Similarly, there was no misjoinder of defendants.

* * *

In conjunction with a Rule 8(a) joinder of offenses, Rule 8(b) has the effect of permitting joinder of defendants where their alleged violations of law have arisen out of the same act or series of acts. 8 Moore, Federal Practice ¶8.06[1], p. 8-23 (2d ed. 1968), citing United States v. Granello, 2 Cir., 1966, 365 F.2d 990, 993; Cupo v. United States, 1966, 123 U.S.App.D.C. 324, 359 F.2d 990; King v. United States, 1 Cir., 1966,

355 F.2d 700, 704-705; Ingram v. United States, 4 Cir., 1959, 272 F.2d 567.

* * *

"Having found that there was no misjoinder of offenses or defendants under Rule 8, it is still necessary to determine whether there was sufficient prejudice to require a severance under Rule 14 of the Federal Rules of Criminal Procedure. Smith v. United States, 5 Cir., 1966, 357 F.2d 486, 489; Bayless v. United States, 9 Cir., 1967, 381 F.2d 67, 72; Brown v. United States, 1967, 126 U.S.App.D.C. 134, 375 F.2d 310, 315. See 8 Moore, Federal Practice ¶14.02 [1] (2d ed. 1968). Rule 14 states, in relevant part, that

> 'If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.'

The existence of prejudice, in large measure, depends upon the facts and circumstances of each case, Flores v. United States, 5 Cir., 1967, 379 F.2d 905, 909; Blachly v. United States, 5 Cir., 1967, 380 F.2d 665, 675; Peterson v. United States, 5 Cir., 1965, 344 F.2d 419, 422, and it is axiomatic that the granting of a severance is within the discretion of the trial judge. Smith v. United States, 5 Cir., 1967, 385 F.2d 34, 37. The burden of demonstrating prejudice is a difficult one, and ruling of the trial judge will rarely be disturbed on review. 8 Moore, Federal Practice ¶14.02 [1], p. 14-3 (2d ed. 1968). The defendant must show something more than the fact that 'a separate trial might offer him a better chance of acquittal.' Id. at ¶14.04 [1], pp. 14-10—14-11, citing Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); Robinson v. United States, 1954, 93 U.S.App. D.C. 347, 210 F.2d 29. See also Johnson v. United

States, 8 Cir., 1966, 356 F.2d 680; Butler v. United States, 8 Cir., 1963, 317 F.2d 249; Smith v. United States, 1950, 86 U.S.App.D.C. 195, 180 F.2d 775."

See also *Peterson* v. *United States*, 405 F.2d 102 (8th Cir. 1969), *cert. denied*, 395 U.S. 938 (1969), *rehearing denied*, 396 U.S. 870 (1969); *Johnson* v. *United States*, 356 F.2d 680 (8th Cir. 1966), *cert. denied*, 385 U.S. 857 (1966); *Butler* v. *United States*, 317 F.2d 249 (8th Cir. 1963), *cert. denied*, 375 U.S. 836 (1963).

We conclude that joinder of offenses and of defendants was proper in this case. Only two of the defendants were involved in the trial of this case, and each had their own attorney. Defendant Lewis did not testify, and thus his criminal record was not before the jury. The court carefully instructed the jury as to what it must find in order to separately convict each defendant. Although defendant was not charged in Count IV, we are unable to discern how he was prejudiced by the joinder of that Count. It is not required that all defendants be charged in each count. *United States* v. *Godel*, 361 F.2d 21 (4th Cir. 1966), *cert. denied*, 385 U.S. 838 (1966). In any event, Count IV was dismissed along with Counts II and V. We hold there was no error.

V— DELAY BETWEEN OFFENSE AND INDICTMENT

Defendant contends the court erred in failing to dismiss the indictment for undue delay between the commission of the offense and the filing of the indictment, based on the fact that a lapse of nine months occurred. Defendant contends he was prejudiced by the delay in that one of his key witnesses died during this period. This issue was first raised by defendant in his motion for new trial, and as such is not now cognizable on this appeal.

Peterson v. *United States, supra.* Assuming arguendo that it were properly before us, the contention is without merit. So long as the applicable statute of limitations is observed, delay of indictment, without more, does not constitute a denial of due process. *See United States* v. *Snyder,* 429 F.2d 1242 (9th Cir. 1970); *Whatley* v. *United States,* 428 F.2d 806 (5th Cir. 1970); *McGregor* v. *United States,* 422 F.2d 925 (5th Cir. 1970); *United States* v. *McCarthy,* 422 F.2d 160 (2nd Cir. 1970), *petition for cert. dismissed,* 398 U.S. 946 (1970); *Terlikowski* v. *United States,* 379 F.2d 501 (8th Cir. 1967), *cert. denied,* 389 U.S. 1008 (1968).

It is settled law in this circuit that the Sixth Amendment applies only from the date of commencement of the criminal prosecution. There is here no evidence of intention of vexatious delay on the part of the government *Terlikowski* v. *United States,* 379 F.2d 501 (8th Cir. 1967).

The contention that defendant was prejudiced by the death of a principal witness for his case must be rejected, for the record indicates that this witness died before the government learned from Knight who had committed the burglaries, and the manner in which the stolen stamps were sold. Further, there is no indication as to what this witness would have said. The actual delay between the time the government learned of defendant's identity and his participation in the crimes and the indictment was only a period of seven months. In light of the proof adduced at trial, and the complicated nature of the case we hold the delay was not prejudicial to defendants.

VI— SPEEDY TRIAL

Defendant also asserts he was denied the right to a speedy trial, alleging he was indicted on December 8, 1967, and was not tried until August 18, 1969, some twenty months later. In *Hodges* v. *United States,* 408 F.2d 543,

549 (8th Cir. 1969), this court, quoting from *United States* v. *Ewell*, 383 U.S. 116 (1966), stated:

> "(1) 'We cannot agree that the passage of 19 months between the original arrests and the hearings on the later indictments itself demonstrates a violation of the Sixth Amendment's guarantee of a speedy trial.' (2) The guarantee 'is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.' (3) However, 'the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.' (4) Then, quoting from earlier cases 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.' 'Whether delay in completing a prosecution * * * amounts to an unconstitutional deprivation of rights depends upon the circumstances. * * * The delay must not be purposeful or oppressive.' '[T]he essential ingredient is orderly expedition and not mere speed.' "

See also, *Whitlock* v. *United States*, 429 F.2d 942, 945-46 (10th Cir. 1970).

The passage of some twenty months in this case does not, in and of itself, demonstrate a denial of the right to a speedy trial. The first safeguard, the prevention of undue harassment and incarceration prior to trial, and the second safeguard, to minimize anxiety and concern accompanying public accusation, have not been raised by this record. The third safeguard, limiting the possibilities that a long delay will prejudice the accused's ability to defend himself, has no merit. No mention is made of the evidence

lost by the lapse of time. The death of one of the proposed defense witnesses has already been discussed. The allegation that defendant was deprived of Matthews' testimony deserves little comment in light of the fact that his deposition was secured before trial. Nowhere is an offer made as to the contents of that deposition. The record indicates that the prosecution requested an earlier trial, and that the only delay occasioned by the prosecution resulted from an injury to the prosecuting attorney. Defendant filed numerous motions during this time period, and his only motion to dismiss for lack of a speedy trial was filed four days before the trial began. The trial took place within the pertinent statutory time limit. Under all the circumstances, we hold there was no unreasonable delay which deprived defendant of his constitutional rights.

VII— THE COURT'S CHARGE

Defendant contends the court erred in its charge to the jury in two significant respects. First, defendant points to the statements by the court referring to the incident as a robbery of post offices or banks when the evidence established a post office burglary. Second, the court allegedly coerced a verdict by implying in its main charge that a verdict of acquittal or conviction must be returned by the jury.

(1) The court referred several times in its final charge to the offense of a "robbery", and since the evidence establishes a burglary, defendant contends there was a fatal error. This contention is without merit. It is axiomatic that instructions must be read as a whole, and words or phrases cannot be read in isolation. *Goings* v. *United States,* 393 F.2d 884, 885 (8th Cir. 1968), *cert. denied,* 393 U.S. 883 (1968). The indictment was read to the jury, which in Count I includes a detailed description of the overt acts charged. The evidence adduced at trial clearly

established a burglary. The jury was fully aware of the charges against the defendant. The court carefully outlined each offense for them, and corrected itself when the error was brought to its attention. This court has previously been confronted with analogous contentions and has rejected them. *See e.g., Theriault* v. *United States,* 401 F.2d 79 (8th Cir. 1968), *cert. denied,* 393 U.S. 1100 (1968); *Beatrice Foods Co.* v. *United States,* 312 F.2d 29 (8th Cir. 1963), *cert. denied,* 373 U.S. 904 (1963). We hold there was no error.

(2) Defendant next contends that the district court, in effect, coerced a verdict by advising the jury in its main charge that unanimity was required, and explaining the effect of a guilty verdict and a not guilty verdict, leaving untouched the third alternative of a hung jury. Defendant urges this court to adopt the rationale of *United States* v. *Fioravanti,* 412 F.2d 407, 420 (3rd Cir. 1969), *cert. denied,* 396 U.S. 837 (1969), where the Court of Appeals for the Third Circuit announced the *Allen* charge would no longer be accepted.[11] We decline to do so.

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11. The charge delivered in the court's main instruction in *Fioravanti,* and objected to by the Court of Appeals for the Third Circuit is markedly different from the charge given in this case:

> "Now, members of the jury, I respectfully tell you it is necessary for the purpose of finding a verdict that all of you agree upon that verdict. In other words, when I say the verdict has to be unanimous, it has to be twelve to nothing.
>
> "It is your duty, however, to agree, if possible. When conferring with each other, you should pay a proper respect to each other's opinions and examine such differences in a spirit of fairness and candor. This does not mean any member of the jury shall yield his well-grounded opinions or violate his oath. It does mean he shall not stand out in an unruly and obstinate way through mere stubbornness. Members of the jury should always closely scrutinize the facts from their own standpoint and the viewpoint also of the fellow-members of the jury.
>
> "While undoubtedly the verdict of a jury should represent the opinion of each individual juror, it by no means follows opinions may not be changed by conferences in the

This court in *Hodges* v. *United States,* 408 F.2d 543 (8th Cir. 1969), considered the question of whether the *Allen* charge was still valid. In answering that question in the affirmative, Judge (now Mr. Justice) Blackmun, stated:

> "We initially reject the claim that the Allen charge itself must be held today, some 70 years after the decision, to be coercive, prejudicial, and unconstitutional. The Supreme Court has not yet seen fit to disavow it and, so long as it stands approved in decided Supreme Court cases, we are not to resolve that issue contrarily.
>
> "Attack upon charges of the Allen type, however, are increasingly frequent. This court has encountered them. In a number of cases the challenged instruction has been upheld. Examples are Bowen v. United States, 153 F.2d 747, 751 (8 Cir. 1946), cert. denied, 328 U.S. 835, 66 S.Ct. 980, 90 L.Ed. 1611; Costello v. United States, 255 F.2d 389, 398 (8 Cir. 1958), cert. denied, 358 U.S. 830, 79 S.Ct. 51, 3 L.Ed.2d 69; Janko v. United States, 281 F.2d 156, 167-168, and cases cited in n. 17 (8 Cir. 1960), rev'd on other grounds, 366 U.S. 716, 81 S.Ct. 1662, 6 L.Ed.2d 846; Holdridge v. United States, 282 F.2d 302, 311 (8 Cir. 1960)." *Id.* at 552.

In *Hodges,* the court was confronted with a supplemental charge to the jury.[12] In the instant case, the language

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jury-room. The very object of a jury system is to secure unity by a comparison of these views. *The jury should listen with deference to arguments of fellow-jurors and distrust of his own judgment if he finds a large majority of the jury taking a different view of the case from that what he does, himself.*" 412 F.2d 414-15 (emphasis in original).

Compare this instruction with the one given in the instant case, note 13, *infra.*

12. The charge given in *Hodges* is set out at 408 F.2d at 553-54, n. 4.

complained of was given in the court's main charge.[13] The American Bar Association has approved such a procedure:

> "For the reasons set forth in the Commentary to section 5.4(b), *infra*, the Advisory Committee has concluded that the instruction commonly referred to as the *Allen* charge or 'dynamite charge' should not be

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13. "Now, members of the jury, it requires all twelve of your number agreeing to return a verdict. . . . You should make every possible effort to arrive at a verdict of some kind, whatever you decide it to be. You should consider the evidence, consider the opinions of each other. It is never quite possible to attain perfection, and it is the duty of a jury—I have never asked any juror and I never shall, to sign a verdict that is against his or her conscience. But I do say to you that it is the duty of the jurors to attempt to arrive at a verdict, if it is possible to do so, with understanding among each other. It is the only way we have of trying cases of this kind. If one jury can not decide it, another jury of the same kind from the same area will have to be called to pass on the case, so every possible effort consistent with your conscience and consistent with your oath should be made to arrive at a verdict."

In discussing a similar aspect of the charge in *Hodges*, the court observed at 554:

> "Of course, one may argue that, technically, it is not correct for the court to say that 'the case must sometime be decided' or that 'some other jury will have to be brought back', see United States v. Harris, supra, 391 F.2d at 355, rather than 'disposed of sometime', see W. Mathes and E. Devitt, Federal Jury Practice and Instructions, § 15.16 (1965). Further, a reference to the expense of trial is not everywhere approved. See United States v. Smith, 303 F.2d 341, 343 (4 Cir. 1962). We feel, however, that the references of this kind which were employed here are, realistically, of small consequence. It is obvious to a jury that a lawsuit is costly and time consuming. It is also obvious to a jury that, if it is unable to arrive at a verdict, the case does not fade away, but remains for decisions or other disposition. Judge Burger in Fulwood v. United States, supra, 365 F.2d at 963, most pertinently observed:
>
> > 'The statement that some other jury would have to decide the case if this one could not was accurate as a generality and, in any event, could have had no coercive impact on the jury. If they already knew what would likely happen if they deadlocked, it was surplusage; if they did not know, this information, far from being coercive, would have had the effect of reducing the pressure on them to reach a verdict.' "

given to a jury which has been unable to agree after some deliberations. Nonetheless, it is most appropriate for the court to instruct the jury initially as to the nature of its duties in the course of deliberations, and section 5.4(a) so provides. The standard does not require the use of any particular language, but does identify the five points on which the jury might properly be advised.

"Illustrative of an instruction consistent with section 5.4(a) is Instruction 8.11 of *Jury Instructions and Forms for Federal Criminal Cases*, 27 F.R.D. 39, 97-98 (1961), which reads:

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Because the instruction contemplated in section 5.4(a) is to be given prior to the time the jury has retired (and thus prior to the time a minority has been established to exist), and because it makes no reference to the minority but instead charges all jurors to consult with one another, the proposed instruction does not have the coercive impact of the *Allen* charge. See

Burroughs v. United States, 365 F.2d 431 (10th Cir. 1966), recommending the practice provided for in section 5.4(a)." *Advisory Committee on the Criminal Trial, ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury—Tentative Draft* at 146-47 (1968).

The Court of Appeals for the Tenth Circuit has also suggested that the substance of the charge be included in the original instructions. *United States* v. *Wynn*, 415 F.2d 135, 137 (10th Cir. 1969), *cert. denied*, 397 U.S. 994 (1970). We conclude that such a procedure is appropriate and not prejudicial to the rights of the defendant. Indeed, the charge given in this case in the main instruction was much less coercive than that given and approved in *Hodges*. The objection to such a charge raised in *Fioravanti*, that a court should not direct a juror to distrust his own judgment and reexamine his opinion in light of the majority opinion of the other jurors is not applicable here because Judge Duncan did not so instruct. The charge given is very similar to that approved by the court in *Fioravanti* and by the American Bar Association. We hold there was no error.

VIII— DENIAL OF PSYCHIATRIC EXAMINATION

Defendant's final contention is that the lower court erred in denying his pretrial motion for psychiatric examination of the government's chief witness, Knight, on the ground that there was and is some question as to Knight's competency. Defendant points specifically to evidence indicating Knight was addicted to narcotic drugs, and had been involved in numerous criminal activities during his life.

Competence of a witness is, as a general rule, a matter to be decided in the sound discretion of the trial judge. *United States* v. *Hicks*, 389 F.2d 49 (3rd Cir. 1968), *cert.*

denied, 391 U.S. 970 (1968), and cases cited. This court will not interfere unless there has been an abuse of that discretion. We have examined Knight's testimony, and it demonstrates that he was responsive, clear, and intelligent in his answers. In addition, the court properly cautioned the jury as to Knight's participation in the conspiracy and burglary.[14] We hold there was no error.

IX— CONCLUSION

After careful examination of this detailed record, and analysis of the arguments presented on behalf of defendant, we conclude there was no error. The judgment of conviction is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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14. "Now, there is also in this case an accomplice. The Government's principal witness in this case was Knight. Knight was a defendant in this case but he has not—has entered a plea of guilty, as the record shows, and he is not here for trial. An accomplice is one who unites with another person or persons in the commission of a crime voluntarily and with common consent. The testimony of an accomplice is competent evidence and the credibility of such an accomplice is for the jury to pass upon as they pass upon the credibility of any other witness. The testimony of an accomplice must be received with great caution, but if the testimony carries conviction and the jury are convinced of its truth, they should give it the same weight as would be given to the testimony of a witness who is in no respect implicated in the offense. While it is a rule of law that a person accused of a crime may be convicted upon the uncorroborated testimony of an accomplice, still a jury should always act upon such testimony with great care and caution and subject it to careful examination in light of all the other evidence in the case; and the jury ought not to convict upon such testimony alone unless after a careful examination of such testimony, they are satisfied beyond a reasonable doubt of its truth and that they can safely rely upon it."

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-345

BILL MILES SKILLMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1971. Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to June 29, 1971, and the petition was filed on June

28, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a tape recording of a telephone conversation between petitioner and a government witness, who consented to the recording, was properly admitted on rebuttal for impeachment purposes.

2. Whether there was sufficient evidence of a conspiracy, separate from the substantive offense.

3. Whether the trial court properly refused to compel a psychiatric examination of a government witness.

4. Whether the trial judge's charge to the jury was coercive.

STATEMENT

After a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on two counts of receiving stolen U.S. postage stamps and one count of conspiring to receive stolen U.S. postage stamps in violation of 18 U.S.C. 641. He was sentenced to concurrent sentences of five years' imprisonment on the conspiracy count and seven years' imprisonment on each of the substantive counts. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).

The evidence, which is fully summarized in the court of appeals opinion (Pet. App. A2-A5), showed that Knight and Lewis, after burglarizing a Post Office in Atlanta, Georgia, communicated with Bob Matthews in Omaha, Nebraska, to discuss the sale

of the stolen postage stamps, which they estimated to be worth $25,000 (A 284-298).[1] Following the instructions of Matthews, the two men proceeded with their loot to Kansas City, Missouri, and then to Chicago, where $3500 worth of the stamps were disposed of (A 297-298, 301-306). On their return to Kansas City they again telephoned Matthews in Omaha and were instructed to call a number in Kansas City (A 307-309). They talked with petitioner at the Kansas City number and arranged a meeting at petitioner's office (A 309-310). Petitioner bought the stamps for 20 percent of face value, paying half the money at that time (A 311-312). After the stamps had been delivered, Knight returned for the second half of the payment. It was agreed that as to any future sale of stamps Knight would call petitioner to make advance arrangements (A 313-314, 319-322).

After Knight, Lewis, and a third man burglarized another post office at Florence, Alabama, less than two weeks later, they again proceeded to Kansas City on instructions from Matthews (A 341-348), and sold the stolen postage stamps to petitioner at his office (A 350, 356-361).

At the trial, Knight testified against petitioner. On direct examination petitioner denied any contact with Knight on the specific dates of the transactions (A 567, 569-571, 574-576). On cross-examination petitioner denied any contact with Knight and said

[1] "A" refers to the record appendix in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

he had never talked with Knight on the telephone (A 584-585, 593). On rebuttal, the government introduced, for impeachment purposes, a tape recording of a telephone call from Knight to petitioner (A 619-624). Petitioner acknowledged on surrebuttal that the voice on the recording was his, and that the conversation was confirmed by his records (A 626-627). The telephone call had been made by Knight on November 24, 1967, about eight months after the last sale, from a U.S. marshal's office where Knight was in custody. The call was made at the instance of a postal inspector who had Knight's permission to listen in and record the phone conversation (A 381, 610-614). The telephone conversation (set out at Pet. 11-13) did not relate to the offenses charged in the indictment. The jury was instructed that the recording was admitted solely to impeach petitioner by rebutting his statement that he had never spoken to Knight on the telephone (A 625).

ARGUMENT

1. The recording of the telephone conversation, made with the consent of one party to the conversation, did not violate petitioner's Fourth Amendment rights. *United States* v. *White*, No. 13, O.T. 1970, decided April 5, 1971; *Rathbun* v. *United States*, 355 U.S. 107.

Petitioner claims that the recording should have been excluded because it was not produced pursuant to a pre-trial order for discovery. As the court below pointed out, the issue was not properly before

it since the contention was raised for the first time on appeal. In any event, it was within the discretion of the trial court to permit the introduction of the recording. Although as a general rule secretly made tape recordings are discoverable under Rule 16(a), the recorded conversation in this case was not a "relevant statement" within the meaning of Rule 16. It was not used in the government's case in chief, but only on rebuttal for impeachment purposes; the subject matter of the conversation was concededly innocuous and had no bearing on the substantive crime charged (Pet. App. A13).

2. Petitioner's attack on the conviction and sentence for conspiracy is fully answered in the opinion below (Pet. App. A5-10). Since petitioner's sentence on that count runs concurrently with longer sentences on the substantive counts, the conspiracy count is of no significance.

3. The fact that the government witness Knight admitted that he had used narcotics and the fact that he had been involved in criminal activity much of his life did not show that he was incompetent to testify. As the court below noted (Pet. App. A31-A32), the witness was responsive, clear and intelligent in his answers. The jury was aware of his prior history and could determine whether he was a credible witness.

4. The charge to the jury was not coercive. The language complained of (set forth in the opinion below at Pet. App. A29, n. 13) was given as part of the main charge, not after the jury had reported disagreement. Since the judge told the jury that if one

jury could not decide the case, another would have to try it, the jurors were aware of the possibility of disagreement. The judge made it clear that no juror should act against his conscience, but merely urged them to attempt to arrive at a verdict. This was not improper. *Brandom* v. *United States*, 431 F. 2d 1391, 1399 (C.A. 7), certiorari denied, 401 U.S. 942. See *Barash* v. *United States*, 412 F. 2d 26 (C.A. 2), certiorari denied, 396 U.S. 832; *Posey* v. *United States*, 416 F. 2d 545 (C.A. 5), certiorari denied, 397 U.S. 946.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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BEATRICE ROSENBERG,
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JULY 1971.

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